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Table of Authorities Cited.

CASES.

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American Importers Association v. CAB, 473 F. 2d 168 (D.C. Cir. 1972)	9
American Meat Institute v. Environ. Protect. Agcy., 526 F. 2d 442 (7th Cir. 1975)	11
Appalachian Power Co. v. Train, 545 F. 2d 1351 (4th Cir. 1976)	15
Bowles v. Willingham, 321 U.S. 503 (1944)	14
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Federal Power Comm'n v. Texaco, Inc., 377 U.S. 33 (1964)	9
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International Harvester Company v. Ruckelshaus, 478 F. 2d 615 (D.C. Cir. 1973)	9
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National Petroleum Refiners Association v. Federal Trade Commission, 482 F. 2d 672 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974)	10
Natural Resources Defense Council, Inc. v. EPA, 537 F. 2d 642 (2d Cir. 1976)	11
Natural Resources Defense Council, Inc. v. Train, 510 F. 2d 692 (D.C. Cir. 1975)	11
Permian Basin Area Rate Cases, 390 U.S. 747 (1968)	9, 14

Portland Cement Association v. Ruckelshaus, 486 F. 2d 375 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974)	10, 11n.
Stone v. Farmers' Loan & Trust Co., 116 U.S. 307 (1886)	9
United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972)	10
United States v. Storer Broadcasting Co., 351 U.S. 192 (1956)	9
WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir. 1969)	8, 9, 10
WBEN, Inc. v. United States, 396 F. 2d 601 (2d Cir. 1968), cert. denied, 393 U.S. 914 (1968)	9
Weyerhaeuser Co. v. Costle, 590 F. 2d 1011 (D.C. Cir. 1978)	10, 15

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3 Envir. Rep. 706 (1972) 11n.

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42 Fed. Reg. 21380 7, 13

43 Fed. Reg. 50042 7, 8, 14

44 Fed. Reg. 32894 14

LEGISLATIVE CITATIONS.

Legislative History: Congressional Research Service,
Library of Congress, A Legislative History of the
Water Pollution Control Act Amendments of 1972,
93d Cong., 1st Sess., Serial No. 93-1 (Comm.
Print. 1973) (two volumes), "___ Leg. His. ___" 5n.

1 Leg. His. 169. Senate Consideration of the Report of
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123 Cong. Rec., S.13,539 (daily ed., Aug. 4, 1977)
remarks of Senator Muskie 13n.

OTHER AUTHORITIES.

Brief for Petitioners, EPA v. National Crushed Stone
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Council on Environmental Quality, 8th Annual Report
(1977) 11n.

Kneese and Kneese, The Economics of Water Utiliza-
tion in the Sugar Beet Industry, 1968 12n.

Koch and Leone, The Clean Water Act: Unexpected
Impacts on Industry, 3 Harv. Env. L.R. 84
(1979) 11n., 12n., 13n.

Leone (ed.), Environmental Controls (1976) 12n.

Leone and Jackson, "The Political Economy of Federal
Regulatory Activity," in Fromm (ed.), Public Regu-
lation of Economic Activity (1979) 12n.

National Commission on Water Quality, Report to
Congress (1976) 12n.

Rauch, Note, The Federal Water Pollution Control
Act Amendments of 1972: Ambiguity as a Control
Device, 10 Harv. J. Leg. 565 (1973) 12n.

Regulatory Policy Committee, U.S. Department of
Congress, Toward Regulatory Reasonableness,
1977 13n.

Voytko, The Clean Water Act and Related Develop-
ments in the Federal Water Pollution Control
Program During 1977. 2 Harv. Env. L.R. 103
(1977) 13n.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-770.

ENVIRONMENTAL PROTECTION AGENCY,
APPELLANT,

v.

NATIONAL CRUSHED STONE ASSOCIATION, ET AL.,
APPELLEES.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
APPELLANT,

v.

CONSOLIDATION COAL COMPANY, ET AL.,
APPELLEES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

**Motion of New England Legal Foundation for Leave
to File Brief as Amicus Curiae.**

Pursuant to Rule 42 of the Rules of the Supreme Court,
New England Legal Foundation moves the Court for leave to
file its brief as amicus curiae bound with this motion in sup-
port of appellees.

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New England Legal Foundation has the consent of counsel for appellant and counsel for appellees to the filing of this brief. Copies of appellees' and appellant's consent letters are filed with the Clerk of the Court.

New England Legal Foundation (NELF) is a non-profit, tax-exempt corporation, organized and existing under the laws of the Commonwealth of Massachusetts for the purpose of engaging in litigation on matters affecting the broad public interest. Policy for NELF is set by a board of directors composed of New England citizens, the majority of whom are attorneys. The board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

New England Legal Foundation's attorneys participated as amicus curiae in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (see 435 U.S. at 785, footnote 22); *Carey v. Brown*, 79-703 (1979) and *Consolidated Edison Company of New York, Inc. v. Public Service Commission of the State of New York*, 79-134 (1979).

The Foundation, due to its unique public interest perspective and extensive work on environmental and economic issues, can provide the Court with additional arguments in this case.

The statutory background of the instant case is complex. Its legislative history is filled with controversy. The Foundation argues that basic principles of administrative regulation, as applied to an agency's actual record of enforcement of pollution controls, should guide this Court's decision. The Foundation is concerned that the enforcement of the Environmental Protection Agency's inflexible variance provision will unnecessarily jeopardize the economic health of the New England community. It is NELF's position that the Court of Appeals decision, rejecting the Environmental Protection Agency's variance provision, should be affirmed.

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For the foregoing reasons New England Legal Foundation respectfully requests permission to participate as amicus curiae and to file the attached brief in support of appellees.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

**Brief of Amicus Curiae New England Legal Foundation
in Support of Appellees.**

Questions Presented.

1. In cases of complex administrative regulation, does the enforcement of uniform standards require a formal pro-

cedure for considering waivers in special circumstances?

2. In the instant case, do substantially divergent costs of compliance or extraordinary economic hardship arising from enforcement of uniform effluent standards constitute special circumstances worthy of consideration in a variance application?

3. If an individual discharger cites an extraordinary economic burden of compliance in an application for a waiver, does the Environmental Protection Agency's narrow obligation of fair consideration render the Federal Water Pollution Control Act unenforceable?

Statement of Facts.

The Federal Water Pollution Control Act ("the Act")¹ prohibits discharge of any pollutant into navigable waters, unless the pollutant discharger complies with effluent standards that are promulgated under the Act. 33 U.S.C. § 1311(a). These effluent standards are based upon the technology of pollution control. Section 301(b) of the Act directs that effluent limits for existing point sources be established in two successive stages. 33 U.S.C. § 1311(b).

First, by 1977, industrial dischargers must comply with effluent limits based upon the level of clean-up achieved by "the best practicable control technology currently available" (BPT). Section 301(b)(1)(A). BPT is based upon "the average of the best existing performance of plants of various sizes, ages, and unit processes within each industrial category."²

¹ The Federal Water Pollution Control Act (P.L. 92-500) as amended by the Clean Water Act of 1977 (P.L. 95-217).

² Senate Conference Committee Report on S.2770, October 4, 1972, in 1 *Legislative History of the Water Pollution Control Amendments of 1972*, Ser. No. 93-1, at page 169 (Comm. Print 1973). (Hereafter "Leg. His.")

Subsequently, by 1987, more stringent effluent limits are to be established. These standards will be based upon the degree of clean-up achieved by the "best available technology economically achievable" (BAT). BAT will be based upon "the best performer in any industrial category." 1 Leg. His. at 170.

Section 304(b)(1)(B) of the Act requires the Administrator of the Environmental Protection Agency (EPA or "Agency"), in his determination of BPT, to consider the following factors: "the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate." 33 U.S.C. § 1314(b)(1)(B).

Section 304(b)(2)(B) of the Act requires that the Administrator, in his determination of BAT, consider the same factors, but with one exception. Rather than balancing the total cost of application of the technology against the effluent reduction benefits, the Administrator must take into account "the cost of achieving such effluent reduction." 33 U.S.C. § 1314(b)(2)(B).

The Act further establishes a system of permits that transforms these generally applicable effluent limitations into specific compliance obligations of individual dischargers. *EPA v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976). No one can discharge pollutants into waters without such a permit. Permits incorporate the effluent limitations promulgated by EPA under § 301(b). 33 U.S.C. § 1342(a)(1). They are issued by EPA or an authorized state agency. 33 U.S.C. § 1342(a-d). A discharger, at the time of

application for a permit, may also request a variance from the applicable 1977 or 1987 effluent limitations set pursuant to § 301(b).

Section 301(c) of the Act states those criteria that EPA shall rely upon in evaluating applications for a variance from the later 1987 standards. 33 U.S.C. § 1311(c). The Act does not, however, state what EPA must consider in granting a variance from the initial 1977 limits.

According to § 301(c) of the Act, EPA may modify the 1987 standards as they apply to a particular point source discharger. These modified requirements must correspond to the maximum use of technology "within the economic capability of the [discharger]." They must result in "reasonable further progress toward the elimination of the discharge of pollutants." Based upon these statutory provisions, EPA will consider the "economic capability or affordability" of specific dischargers in granting waivers to the 1987 limits. 43 Fed. Reg. 50042 (1978).

In the absence of statutory criteria for granting a variance to the 1977 standards, EPA promulgated a regulation pursuant to its rule-making authority. 40 C.F.R. 423.12(a). Under this regulation, a discharger may obtain a variance from the 1977 limits only if "factors relating to the equipment or facilities involved, the process applied or other such factors related to such discharger are fundamentally different from the factors considered in [setting the 1977 limitations]." See, e.g., 42 Fed. Reg. 21380. In 1974, EPA limited this provision's application to cases involving "factors of a technical and engineering nature." The Agency specifically excluded "economic factors" from consideration. 39 Fed. Reg. 30073. EPA subsequently modified its position. "[A] plant may be able to secure a [1977 limitations] variance by showing that the plant's own compliance costs with the national guideline limitation would be x times greater than

the compliance costs of the plants EPA considered in setting the [1977 limitations]. A plant may not, however, secure a variance by alleging that the plant's own financial status is such that it cannot afford to comply with the [1977 limitations]." 43 Fed. Reg. 50042 (1978).

New England Legal Foundation adopts appellees' description of the opinions below.

Summary of Argument.

New England Legal Foundation argues as follows. In cases of complex administrative regulation, the enforcement of uniform standards requires a formal procedure for considering waivers in special circumstances. In the instant case, substantially divergent costs of compliance and extraordinary economic hardship arising from enforcement of uniform effluent standards are both special circumstances worthy of consideration in a variance application. When an individual discharger cites an extraordinary economic burden of compliance in its application for a waiver from 1977 or 1987 effluent standards, the EPA's narrow obligation of fair consideration does not render the Act unenforceable.

Argument.

I. IN CASES OF COMPLEX ADMINISTRATIVE REGULATION, THE ENFORCEMENT OF UNIFORM STANDARDS REQUIRES A FORMAL PROCEDURE FOR CONSIDERING WAIVERS IN SPECIAL CIRCUMSTANCES.

An administrative agency may implement laws within its jurisdiction by promulgating generally applicable rules. *WAIT Radio v. FCC*, 418 F. 2d 1153, 1157 (D.C. Cir. 1969). The conditions of compliance with these rules may vary somewhat from one regulated entity to another, so long as these differences result in "strains rather than injustice."

American Importers Association v. CAB, 473 F. 2d 168, 174 (D.C. Cir. 1972). "[The] power to regulate is not a power to destroy." *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886).

An agency's discretion to proceed in difficult areas through general rules is "intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances." *WAIT Radio v. FCC*, *supra* at 1157; accord, *Federal Power Comm'n v. Texaco, Inc.*, 377 U.S. 33, 40 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 204-205 (1956); *National Broadcasting Company v. United States*, 319 U.S. 190, 219-220 (1943); *International Harvester Company v. Ruckelshaus*, 478 F. 2d 615, 641 (D.C. Cir. 1973); *WBEN, Inc. v. United States*, 396 F. 2d 601, 618 (2d Cir. 1968), *cert. denied*, 393 U.S. 914 (1968); *American Airlines, Inc. v. Civil Aeronautics Board*, 359 F. 2d 624, 628-629 (D.C. Cir.) (*en banc*), *cert. denied*, 385 U.S. 843 (1966). The administration of a uniform licensing rule did not excuse the Federal Communications Commission from fairly considering an application for a variance that was consistent with the agency's "public interest" mandate. *WAIT Radio v. FCC*, *supra* at 1158. The existence of uniform emissions standards did not excuse the EPA from fairly considering an application for extension when timely enforcement might have extraordinary, industry-wide economic consequences. *International Harvester Company v. Ruckelshaus*, *supra* at 632-639. The administration of uniform pricing formulas was constitutionally permissible so long as the Federal Power Commission provided consideration of special relief for hardship cases. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784-787 (1968).

As these cases demonstrate, "special circumstances" arise when mechanical application of the general rule runs counter to the rationale of the rule or the mission of the agency, when

the overall benefits of enforcement are substantially outweighed by its costs, or when the rule's application to an individual regulated entity would cause extraordinary economic hardship. See also *WAIT Radio v. FCC*, *supra* at 1159; *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F. 2d 672, 680-681 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972); *Portland Cement Association v. Ruckelshaus*, 486 F. 2d 375, 399 (D.C. Cir.), *cert. denied*, 417 U.S. 921 (1974); *Gulf Oil Corporation v. Hickel*, 435 F. 2d 440, 447 (D.C. Cir. 1970). Such "special circumstances" are an inevitable consequence of an agency's limited resources to fashion exact rules for a large number of regulated entities, even when statutory provisions for rule making apparently provide sufficient flexibility. *Portland Cement Association v. Ruckelshaus*, *supra* at 399.

II. IN THE INSTANT CASE, SUBSTANTIALLY DIVERGENT COSTS OF COMPLIANCE AND EXTRAORDINARY ECONOMIC HARDSHIP ARISING FROM ENFORCEMENT OF UNIFORM EFFLUENT STANDARDS ARE BOTH SPECIAL CIRCUMSTANCES WORTHY OF CONSIDERATION IN A VARIANCE APPLICATION.

The requirement of a formal variance mechanism for special circumstances applies equally well to EPA's promulgation of effluent limits under both the 1977 and the 1987 provisions of the Federal Water Pollution Control Act. *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977). The formal waiver procedure must be sufficiently flexible to accommodate these special circumstances. *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, 1032 (D.C. Cir. 1978).

To characterize these special circumstances precisely, we must examine EPA's actual record of enforcement of the Act. The sheer number of different point sources potentially

subject to regulation made it impossible for EPA, with its limited resources, to formulate exact fitting effluent limitations.³ Hence, EPA resorted to sampling. *Natural Resources Defense Council, Inc. v. EPA*, 537 F. 2d 642, 647 (2d Cir. 1976). Pursuant to §§ 301 and 304 of the Act, the Agency contracted different private consultants to analyze the technical conditions of effluent reduction in sample firms in a given industrial category, and then partitioned each category into subcategories according to the production process applied.⁴ When EPA became aware of other production processes in an industry for which it had no sample observations, the Agency created the requisite additional subcategory and extrapolated BPT-based effluent standards from other industries. *American Meat Institute v. Environ. Protect. Agcy.*, 526 F. 2d 442, 453 (7th Cir. 1975). As a result of court order, EPA was compelled to set some effluent limits in extreme haste. *Natural Resources Defense Council, Inc. v. Train*, 510 F. 2d 692, 704 (D.C. Cir. 1975). Commenting on EPA's progress toward implementation of the Act, the National Commission on Water Quality noted that many effluent limits

³ The EPA Administrator himself noted that there is no way that anyone sitting in Washington can properly prepare a document which specifies the effluent limitations for all of the tens of thousands of plants around the country because every plant involves factors which differentiate it from others and directly affect what will be the BPT for that plant. 3 *Envir. Rep.* 706 (1972). See also *Portland Cement Association v. Ruckelshaus*, 486 F. 2d at 399.

⁴ By 1977, EPA had divided some industries into as many as 51 subcategories based upon the production process applied. Council on Environmental Quality, Eighth Annual Report (1977) at 38. For example, tissue paper mills using the bleached kraft process are subject to different effluent limitations than those using the deinking process. Koch and Leone, *The Clean Water Act: Unexpected Impacts on Industry*, 3 *Harv. Env. L.R.* 84, 107 (1979).

were too simplistic and often required a "force-fit" for individual plants.⁵

As a result, extremely wide variations in both the costs of compliance and the severity of the economic burden of compliance have been the rule and not the exception.⁶ In the tissue industry, costs of compliance with BPT limits ranged from \$1.85 per ton to \$82.82 per ton in 1974, with an average of \$9.40 per ton.⁷ In the electric power industry, capital costs of compliance with thermal pollution controls varied from \$9.00 per kilowatt to \$81.00 per kilowatt.⁸ A number of studies have shown that the incremental cost of discharge treatment rises extremely rapidly as the 90-95 percent clean-up level is approached.⁹ If the best practicable control technology, i.e., "the average of the best existing performance,"¹⁰ achieves treatment levels far beyond what other dischargers in the subcategory can achieve, the resulting divergence in costs could be substantial. This appears to be the case in the pulp and paper industry.¹¹

⁵ National Commission on Water Quality, Report to Congress, 1976, p. 8. As a remedy, the Commission recommended greater flexibility and discretion by the Administrator.

⁶ See the studies of the petroleum refining, pulp and paper, textile, aluminum and metal finishing industries in Leone (ed.), *Environmental Controls*, 1976, at 25, 45, 89, 100, 101, 103 and 110.

⁷ Leone and Jackson, "The Political Economy of Federal Regulatory Activity," in Fromm (ed.), *Public Regulation of Economic Activity*, 1979; also, Koch and Leone, *supra*, note 2 at 91.

⁸ Brief for Petitioners, *Appalachian Power Co., et al. v. Train*, at 31-33 and 2 App. 648.

⁹ For example, Kneese and Kneese, *The Economics of Water Utilization in the Sugar Beet Industry*, 1968. The cost of treating the last five percent of pollutants may equal or exceed the total cost of treating the first 95 percent.

¹⁰ Leg. His. at 169.

¹¹ Rauch, Note, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 Harv. J. Leg. 565, 579 (1973).

Abatement costs, it has been shown, are strongly related to plant age and size.¹² Although these classifying factors were explicitly authorized in 1977 by this Court in *E.I. duPont de Nemours & Co. v. Train*, 430 U.S. at 130-132, they had not been fully considered by EPA. Of the approximately 4000 major industrial dischargers nationwide, more than 600 failed to meet the July 1977 deadline for compliance with BPT-based limits.¹³ Those who failed were mostly older plants with large local payrolls, often clustered in specific geographic areas or industries.¹⁴ Nearly 50 percent of the nation's iron and steel plants failed to meet the deadline.¹⁵ To avoid plant closings and unemployment among steel producers in Mahoning Valley, near Youngstown, Ohio, EPA was compelled to subcategorize iron and steel plants in that area. The Agency then promulgated less stringent standards for this subcategory than those applicable to the rest of the industry.¹⁶

These facts demonstrate that extremely wide variations in the economic burden of compliance have not necessarily arisen from identifiable engineering features that are "fundamentally different than the factors considered [in setting the 1977 limitations]." 42 Fed. Reg. 21380. In many cases, they have arisen from EPA's inability, in the face of limited

¹² Koch and Leone, *supra* at 107.

¹³ See Testimony of Thomas C. Jorling, EPA Assistant Administrator for Water and Hazardous Materials before the Senate Committee on Environmental and Public Works as reported by Senator Muskie, 123 Cong. Rec. S.13,535 (daily ed., Aug. 4, 1977).

¹⁴ Voytko, *The Clean Water Act and Related Developments in the Federal Water Pollution Control Program During 1977*, 2 Harv. Env. L.R. 103, 104-105 (1977).

¹⁵ See 123 Cong. Rec., S.13,539 (daily ed., Aug. 4, 1977) remarks of Senator Muskie.

¹⁶ Regulatory Policy Committee, U.S. Department of Congress, *Toward Regulatory Reasonableness*, 1977, at 45, 59.

resources, to consider fully those factors already enumerated in § 304(b)(1)(B) of the Act.

The granting of waivers is not dictated merely because "high cost operators may be more seriously affected . . . than others." *Permian Basin Area Rate Cases*, 390 U.S. at 769, citing *Bowles v. Willingham*, 321 U.S. 503, 518 (1944). But the extremely wide variations in the economic burden of compliance in this case clearly establish the presumption that mechanical application of uniform standards is likely to impose an inequitable and confiscatory burden on a significant number of plants. In light of this presumption, EPA is obligated to consider the economic burden of compliance as evidence of "special circumstances" warranting the granting of a variance.

Contrary to its original exclusion of "economic factors" from consideration in a variance application (39 Fed. Reg. 30073), EPA will now consider a showing that "adherence to the 1977 limitations would be substantially more expensive than compliance by other members of the same industry." Petitioner's Brief at 10-11. See also 44 Fed. Reg. 32894 (1979); 43 Fed. Reg. 50042 (1978). The Agency draws a distinction between this type of evidence and the allegation that a discharger-applicant simply cannot afford to comply with the limitations. Petitioner's Brief at 11; 43 Fed. Reg. 50042 (1978). EPA bases this distinction on its statutory interpretation that § 301(c), allowing waivers according to "the economic capability of the [discharger]," applies only to the 1987 limitations.

Since EPA has already agreed to consider substantial differences in the cost of compliance, the only case at issue is where a business potentially hard hit by the BPT-based limits cannot demonstrate a substantial cost difference or other special circumstance. Yet the economic consequence of business shutdown would alone establish a significant cost

differential. To enforce this distinction, EPA must therefore rule out the possibility that the compliance will lead to an applicant's business failure. But this cannot be accomplished by exclusion of "affordability" or "financial status" from consideration in a waiver application. Both extraordinary compliance costs and extraordinary hardships are potentially special circumstances that require a flexible rather than a categorical approach to enforcement. The distinction between them is arbitrary.

III. WHEN AN INDIVIDUAL DISCHARGER CITES AN EXTRAORDINARY ECONOMIC BURDEN OF COMPLIANCE IN ITS APPLICATION FOR A WAIVER FROM 1977 OR 1987 EFFLUENT STANDARDS, EPA'S NARROW OBLIGATION OF FAIR CONSIDERATION DOES NOT RENDER THE ACT UNENFORCEABLE.

EPA's consideration of the economic burden of compliance is not a license to avoid the Act's strict effluent standards. *Weyerhaeuser Co. v. Costle*, 590 F. 2d at 1035. It merely allows the petitioning firm to present to the Agency its economic concerns. The discharger-applicant, and not the EPA, has the burden to determine the economic impact of the effluent standards and to present the information convincingly in a variance application. EPA is not compelled to undertake cost/benefit analysis. A discharger's demonstration that compliance with BPT-based limits imposes extraordinary costs does not automatically yield him a variance. The narrow obligation of the Agency is to consider the costs of compliance as one of many factors. *Appalachian Power Co. v. Train*, 545 F. 2d 1351, 1359-1360 (4th Cir. 1976).

A variance procedure that is sensitive to the economic burden of compliance will not degenerate into unworkable, case-by-case regulation. The record of enforcement of the Act demonstrates the importance of flexibility in the admin-

istration of general rules. EPA is obligated to balance the goal of uniformity against this flexibility requirement. Because such desired flexibility will require consideration of special circumstances, some degree of case-by-case enforcement is likely. But the fair consideration of economic hardship cases is only one element in the achievement of administrative flexibility. There is no showing in this case that fair consideration of economic impact will by itself overburden the enforcement of the Act. Congress's belief that consideration of a discharger's "cost of achieving effluent reduction" would not disarm the Act is demonstrated by its explicit imposition of such a requirement in the Act's 1987 variance procedure.

Conclusion.

The statutory background of this case is complex. Its legislative history is filled with controversy. New England Legal Foundation argues that basic principles of administrative regulation, as applied to an agency's actual record of enforcement of pollution controls, should govern this Court's decision.

The Court below should be affirmed.

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